

Avoiding The Retaliation Nightmare: It's Just Gotten Scarier

On June 22, 2006, the U.S. Supreme Court provided some additional "clarification" regarding employee retaliation protections under Title VII. Retaliation cases arise when an employee or applicant claims that an organization took "adverse action" against them because they filed a discrimination complaint, acted as a witness, or assisted in a discrimination investigation. A key question has always been what constitutes "adverse action?" The Court, in *Burlington Northern & Santa Fe Railway Co. v. White*, outlined a broad definition, thereby opening the door to more retaliation cases.

In the case, an employee had filed a sexual harassment complaint. The company responded by disciplining the alleged harasser and reassigning the plaintiff from her forklift job to a laborer job that she had held earlier. Her pay and benefits were unchanged. In an unrelated action, the employee was later suspended without pay. The Court sided with the employee, concluding that the reassignment was "materially adverse" because the laborer job involved more physical and dirty work. The temporary suspension was also material.

The Court concluded that an alleged retaliatory act under Title VII does not need to directly impact a term or condition of employment (e.g., a discharge, denial of promotion, placement in a less desirable work assignment). Rather, retaliatory actions include more than these "ultimate" or "tangible" adverse employment acts and include those that would be "materially adverse to a reasonable employee or job applicant" either on or off the job. Basically, the employer's actions "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Of course insignificant harm, "petty slights or normal annoyances" would not be covered.

The Court also noted that the context of the actions must be considered. What could be "material" in one situation could be insignificant in another. For example, a schedule change might be unimportant to many people but to a single parent with small children it might be huge. The fact that the context must be considered requires that each case be decided on a case-by-case basis.

There is no "bright line" test. The degree to which this case will affect you depends upon where you live. Lower courts had adopted various standards. A lot of things remain unclear after this decision including the specific definition of "materially adverse." What is clear though is that employers must be even more careful to avoid even the appearance of retaliation against an employee who may be involved in a discrimination case. A few things to consider include:

- Closely review all employment actions taken against an employee who has engaged in a "protected" activity (Hopefully do so before the action is taken!). Consider your motivations. Would you treat other employees similarly? Do company policies and practices support the action?
- Train your managers regarding employment law issues and retaliation. Provide them with specific examples of what could constitute retaliation.
- Require that managers avoid even coming "close to the retaliation line."
- Caution managers to exercise patience and restraint when dealing with employees who have engaged in protected actions. Some times these people are chronic whiners and troublemakers, which makes such restraint difficult.

- Treat the employee like everyone else. Don't be afraid of or avoid the employee. Many times after a discrimination complaint is filed managers are reluctant to hold the employee to company or performance standards. Such avoidance creates the impression that the employee really is treated differently, may give him the idea that he can do whatever he wants, and may alienate other coworkers who believe he's "getting away with murder." Continue to document problem behavior or performance as you would for any other employee.
- Require that managers consult with HR before taking employment actions involving employees involved in protected activity. A neutral viewpoint is critical.
- Document, document, document. As always, ensure that your actions are well documented.
- Adopt and enforce "no retaliation" policies. Ensure that they are included in your manuals and handbooks and that your employees are well aware that you take the issue very seriously.

Given the rising number of retaliation claims and the fact that they are now regularly included with discrimination complaints it is more important than ever to take steps to avoid them. Otherwise you may end up winning a discrimination case but losing on the retaliation claims.

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